Citation: *A. V. H. v. Minister of Employment and Social Development,* 2015 SSTAD 617

Appeal No: AD-15-166

BETWEEN:

A. V. H.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: May 21, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is granted.

INTRODUCTION

[2] On January 16, 2015, the General Division of the Social Security Tribunal, (the Tribunal), issued a decision denying the Applicant a *Canada Pension Plan*, (CPP), disability benefit. The Applicant has filed an application seeking leave to appeal, (the Application), the General Division decision.

ISSUE

[3] The Tribunal must decide whether the Appeal has a reasonable chance of success.

THE LAW

[4] Appeals of a General Division decision are governed by sections 56 to 59 of the *Department of Employment and Social Development Act*, (DESD Act). Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The grounds of appeal are set out in subsection 58(1). They include breaches of natural justice; errors of law and errors of fact.[1] These are the only grounds of appeal.

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[1] **58(1) Grounds of Appeal** –

a. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
b. The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
c. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[6] On the behalf of the Applicant his Counsel submitted that the General Division made several errors of law as well as based its decision on a number of erroneous findings of fact that were grounded in speculation as opposed to the oral and documentary evidence.

ANALYSIS

[7] Applications for leave to appeal are the first stage of the appeal process. The threshold is lower than that which must be met on the hearing of the appeal on the merits. However, in order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC).

[8] The Federal Court of Appeal has found that an arguable case at law is akin to whether, legally, an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63. Therefore, the Tribunal must first determine if the reasons for the Application relate to a ground of appeal that would have a reasonable chance of success.

Alleged Errors of Law

[9] The first issue raised by Counsel for the Applicant is an alleged failure by the General Division to engage in a "real world" analysis consistent with *Villani*.[2] At paragraph 42 of the decision the General Division makes reference to the *Villani* decision and its requirement that any analysis of the "severity" of the Applicant's disability in relation to the Applicant's employability must consider factors such as his or her age, level of education, language proficiency and past work and life experience.

[10] The decision makes no further reference to *Villani*, nor does the General Division engage in any analysis that might be termed a "*Villani* analysis" i.e. a "real world" analysis. In

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[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

light of the clear direction provided by the Federal Court of Appeal in *Villani,* mandating such an analysis it would appear, on its face, that the absences of a "real world" analysis would necessarily point to an error of law. The analysis, however, does not simply stop there. In its later decision in *Giannaros*[3] the Federal Court of Appeal indicated that such a failure was not necessarily fatal to the decision.

[11] According to the Federal Court of Appeal, a "real world" analysis would not be necessary where the decision maker is not persuaded that there is a serious medical condition. Thus, in the Tribunal's view, *Giannaros* would apply to the instant case because the General Division made an anterior finding that the Applicant did not suffer from a severe medical condition. Therefore there is no error of law, in this regard, on the part of the General Division.

Did the General Division err by identifying the primary issue for determination as whether the Applicant's inability to perform work duties with his dominant right arm constitutes a severe disability?

[12] This is the question posed by the Applicant's second submission. At paragraph 53 of its decision, the General Division states that the primary issue it must determine is whether the Appellant's inability to perform work duties with his dominant right arm constitutes a severe disability in accordance with the CPP criterion. With respect, this is not a correct statement of the test set out in the DESD Act para. 42(2)(a). The severe test requires a determination of whether or not an applicant is incapable regularly of pursuing substantially gainful employment. It involves more than a determination of whether the Applicant can perform work duties with his dominant right arm.

[13] In his analysis, the General Division Member relies on a number of PAB decisions, in particular *B.G. v. MHRSD,*[4] to support his conclusion that the loss of the full use of the Applicant's dominant right arm did not constitute a severe disability. The General Division Member then links his finding to the Applicant's chronic right shoulder pain, which he finds is not sufficient to establish a severe disability. There is, however, scant analysis of why the

[3] *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187.
[4] *B.G. v. MHRSD* (April 1, 2008) CP 25254 (PAB).

Applicant's chronic right shoulder pain did not meet the test for "severe". Accordingly, the Tribunal is satisfied that the Applicant has raised an arguable case on this point.

[14] Counsel for the Applicant has also submitted that the General Division erred in law by speculating that the modified duties offered by the Applicant's employer were suitable. Counsel argues that the General Division Member places undue reliance on the opinion of the WSIB Return to Work Specialist. The Tribunal finds no error on the part of the General Division. The ability to obtain and maintain substantially gainful employment is at the heart of the General Division determination. As the Member correctly noted the burden of proof rests with the Applicant. Further, the CPP and the WSIB apply different criteria to their respective assessments of disability. Therefore, where there was evidence, as there was in this case, that the modified duties that had been offered to the Applicant were suitable, the Tribunal is of the view that it was incumbent upon the Applicant to offer the documentation that supported his opposite position, particularly where that documentation was in the Applicant's possession and control.

[15] For the same reason the Tribunal finds that the General Division did not err in drawing a negative inference from the Applicant's failure to provide the said documentary evidence.

Alleged Errors Fact

[16] Counsel for the Applicant argued that the General Division based its decision on a number of erroneous findings of fact grounded in speculation rather than the oral evidence and documentary evidence. In his reasons for appeal Counsel argues that the General Division speculated about the Applicant's efforts to retrain and /or pursue alternative light employment with no outside assistance. Counsel argues that the General Division's findings "contrast" with those of the "WSIB Tribunal that from February 10, 2010 through (at least) until July 2013 there was no suitable and available work with the employer and the Appellant was unlikely to be able to earn any employment income otherwise".

[17] The Tribunal is not persuaded by the arguments of Counsel for the Applicant. The Tribunal finds that the General Division arrived at its findings based on the Applicant's oral

testimony concerning his language training and efforts to obtain alternative work. The Tribunal finds no error on the part of the General Division, thus this is not a ground of appeal.

CONCLUSION

[18] Counsel for the Applicant presented a number of arguments that he submitted supporting the granting of the Application. Of the arguments made, the Tribunal has found that he has raised an arguable case in relation to the General Division's analysis of whether or not the Applicant suffers from a severe disability.

[19] The Application for leave to appeal is granted.

Hazelyn Ross
Member, Appeal Division